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Supreme Court, U.S.
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No. 02-1498

IN THE

Supreme Court of the United States

B. WILLIS, C.P.A., INC.,

Petitioner,

v.

SURFACE TRANSPORTATION BOARD,
UNITED STATES OF AMERICA, ET AL.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

Kenneth E. McDonough
Assistant General Counsel
American Electric Power
Service Corporation
One Riverside Plaza
Columbus, OH 43215

C. Michael Loftus*
Karen Hassell Herren
Slover & Loftus
1224 17th Street, N.W.
Washington, DC 20036
Tel: (202) 347-7170

Counsel for Respondent
Public Service Company of Oklahoma

June 13, 2003

*Counsel of Record

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Surface Transportation Board have jurisdiction over private trackage prior to passage of the ICC Termination Act of 1995?

2. Did the Preemption Provision of the ICC Termination Act of 1995 extend the Surface Transportation Board's jurisdiction to private trackage?

3. Does the appellate court's decision suffer from any procedural errors?

PARTIES TO THE UNDERLYING PROCEEDING

Petitioner in the underlying proceeding was B. Willis, C.P.A., Inc. ("Willis"). In addition, the following parties in the underlying proceeding had interests that were adverse to Willis: The Surface Transportation Board ("STB" or "Board"), the United States of America, Public Service Company of Oklahoma doing business as American Electric Power ("PSO"), and The Burlington Northern and Santa Fe Railway Co. ("BNSF").

Respondent PSO is a public utility corporation which markets energy and energy-related services in eastern and southwestern Oklahoma, and is a wholly-owned subsidiary of AEP Utilities, Inc. (formerly Central and South West Corporation). AEP Utilities is controlled by American Electric Power Company, Inc. based in Columbus, Ohio which is engaged principally in generating, marketing, and trading energy.

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OPINIONS OF THE COURT OF APPEALS AND THE SURFACE TRANSPORTATION BOARD

The November 26, 2002 *per curiam* disposition of the Court of Appeals for the District of Columbia Circuit, not officially reported, is set forth at page 1a of the Appendix to the Petition ("Pet. App."). The STB's decision in its Docket No. 34013, *B. Willis, C.P.A., Inc. – Petition for Declaratory Order*, S.T.B. Served Oct. 3, 2001, denying declaratory relief is located at Pet. App. at 4a. The STB denied Willis's petition to reopen in Docket No. 34013, *B. Willis, C.P.A., Inc. – Petition for Declaratory Order*, S.T.B. Served July 26, 2002, which is attached hereto in the Appendix to Respondent PSO's opposition ("App.") at A-1. The court of appeals denied Willis's petitions for rehearing and for rehearing *en banc* on January 10, 2003. These orders are set forth in Pet. App. at 12a - 14a.

JURISDICTION

The court of appeals entered judgment on Willis's petitions for rehearing and rehearing *en banc* on January 10, 2003. The Petition for Writ of Certiorari is thus timely filed under 28 U.S.C. § 2350 (2003). Jurisdiction lies under 28 U.S.C. § 1254(1) (2003).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are set out verbatim in the Appendix as follows:

49 U.S.C. § 10102 (2002) A-10
49 U.S.C. § 10501 (2002) A-12
49 U.S.C. § 10901 (2002) A-14
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STATEMENT OF THE CASE

Prior to 1995, PSO's Northeast Generating Station located near Oologah, Oklahoma, was served by only one railroad, the Missouri Pacific Railroad Company ("MP"). However, the Burlington Northern Railroad Company ("BN"),[1] owned and operated a rail line located less than ten miles away. In 1994-95, in order to obtain direct service from BN as a competitive alternative to MP, PSO built a new track—the private trackage at issue in this proceeding—approximately 9.8 miles in length from the Northeast Station out to a connection with BN's line near Claremore, Oklahoma.

The new track was planned and constructed as a private track and has always been operated as such. The track was constructed under PSO's direction and at its expense by a private contractor. It is, and always has been, owned by PSO. Likewise, the cost of maintaining the track is, and always has been, borne entirely by PSO, which has arranged for the maintenance work to be performed by a private contractor. The track is used exclusively for PSO's coal traffic; no traffic for any other shipper has ever been moved over the track. PSO is not a common carrier by rail and has never held out to provide rail transportation over its private track to any party.

Since the PSO private trackage was completed, BN/BNSF has provided service over it pursuant to an Industrial Track and Operating Agreement entered into in March 1995. BN/BNSF has never compensated PSO for the use of the track or paid for maintenance of the track. BNSF has no authority to provide service over the track to any other

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[1] BN merged in 1996 with the Atchison, Topeka & Santa Fe Railway Company and its successor is BNSF.

shipper.

PSO, a unit of American Electric Power Company, is an investor-owned electric utility. PSO began to acquire right-of-way for the track to serve Northeast Station in 1992.

A very small part of the route for the private track crossed property owned by Willis.[2] When attempts to purchase right-of-way from Willis failed, PSO filed a condemnation proceeding.[3] Per statutory and constitutional procedures, Commissioners were appointed to determine the amount of just compensation to be paid.[4] PSO paid the amount of the Commissioners' award into the court which entitled PSO to enter upon the property and begin construction.[5] Willis filed an Exception to the Commissioners' Report, which included numerous objections; however, Willis did not claim at that time that PSO was required to obtain approval from the Interstate Commerce Commission ("ICC") (now the STB) before condemning land for the track's right-of-way or constructing the trackage.[6]

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[2] The total area of the right-of-way on Willis's property needed for the trackage is 4.18 acres.

[3] *Public Service Company of Oklahoma v. B. Willis, C.P.A., Inc.*, No. CJ-92-507 (Rogers County D. Ct. filed Oct. 29, 1992).

[4] Okla. Stat. Ann. tit. 66, § 53 (West 2002). The Report of Commissioners was filed with the Rogers County Court on December 28, 1992.

[5] The amount of the award was $49,920.00.

[6] The underlying case is now on remand to the state trial court on procedural and discovery-related issues. *See Public Serv. Co. of Okla. v. B. Willis, C.P.A., Inc.*, 941 P.2d 995 (Okla. 1997).

Shortly after the Oklahoma condemnation case was filed, a series of procedural motions, appeals, and applications for original jurisdiction to the Supreme Court of Oklahoma ensued. After Willis threatened to interfere with the construction of the track, PSO was forced to obtain a temporary restraining order in which the court stated that "[PSO] has a presently existing statutory right to use and possession of the railroad spur" and "entry of the requested relief is necessary to avoid irreparable harm to [PSO] and those members of the public relying upon electrical power from [PSO's] Northeast Station."

Willis has also initiated a spate of collateral litigations, including no less than six applications to the Supreme Court of Oklahoma for extraordinary relief while the condemnation suit was pending in the trial court.[7] Willis also filed two separate lawsuits in federal court, one of which added BN as

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[7] None of these cases resulted in an opinion, published or unpublished, and all were terminated by order of the court. The Supreme Court of Oklahoma case number, date of filing, and order of the court are as follows: (1) *B. Willis, C.P.A., Inc. v. Goodpaster*, No. 83,691 (filed June 8, 1994) (Okla. 1996), Application to Assume Original Jurisdiction Denied; (2) *B. Willis, C.P.A., Inc. v. Goodpaster*, No. 90,105 (filed Sept. 24, 1997) (Okla. 1997), Application to Assume Original Jurisdiction Denied; (3) *B. Willis, C.P.A., Inc. v. Goodpaster*, No. 90,432 (filed Nov. 21, 1997) (Okla.1997), Application to Assume Original Jurisdiction Denied; (4) *B. Willis, C.P.A., Inc. v. Goodpaster*, No. 91,865 (filed Sept. 9, 1998) (Okla. 1998), Application to Assume Original Jurisdiction Denied; (5) *B. Willis, C.P.A., Inc. v. Goodpaster*, No. 92,562 (filed Feb. 4, 1999) (Okla. 1999), Application to Assume Original Jurisdiction Denied; and (6) *B. Willis, C.P.A., Inc. v. Goodpaster*, No. 95,652 (filed Dec. 21, 2000) (Okla. 2000), Application to Assume Original Jurisdiction Denied.

a defendant,[8] which raised the same ICC/STB approval argument Willis is raising here, and lost. *B. Willis C.P.A., Inc., v. Burlington N. R.R.*, No. 96-CV-059-E (N.D. Okla. 1997), *aff'd* 182 F.3d 931 (10th Cir. 1998), *cert. denied*, 528 U.S. 1003 (1999). Willis brought another action in federal district court against the Oklahoma State court judge involved in the condemnation proceeding, PSO, and others, alleging civil rights violations, i.e., that an injunction issued by the state trial court (after Willis wrote a letter threatening to interfere with operation of the track) violated Willis's free speech rights. The federal district court's dismissal of those claims was upheld, in *B. Willis, C.P.A., Inc. v. Goodpaster*, 183 F.3d 1231 (10th Cir. 1999), *cert. denied*, 528 U.S. 1046 (1999). As the above citations reflect, Willis has petitioned this Court to accept certiorari on matters related to the present petition on two prior occasions. In both instances certiorari was denied.

Willis did not raise the issue of ICC/STB authorization for construction of the track at the agency until more than eight years after the beginning of the condemnation proceeding. Following Willis's sixth unsuccessful application to the Supreme Court of Oklahoma, he commenced this case before the STB. In February 2001, Willis filed a Petition for Declaratory Order with the STB requesting that the Board declare that the track at issue required a regulatory license or certificate under 49 U.S.C. § 10901 (2002) before it could be lawfully built and operated. After receiving oppositions from PSO and BNSF, the Board denied Willis's request on October 3, 2001 on the ground that

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[8] Case No. 96-CV-059-E (*Willis v. PSO*) and Case No. 96-CV-172-H (*Willis v. PSO and BN*), in the United States District Court for the Northern District of Oklahoma, the cases were consolidated under No. 96-CV-059-E.

the track and operations at issue are not subject to the STB's jurisdiction. In June 2002, Willis petitioned the STB to reopen and reverse its prior decision. The STB denied this request on July 26, 2002.

On October 9, 2001, Willis petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the STB's October 3, 2001 decision. After briefing and oral argument by the parties, the court of appeals upheld the STB's determination that the Board does not have jurisdiction over this dispute. Pet. App. at 1a - 3a. On December 23, 2002, Willis filed a Petition for Panel Rehearing or in the Alternative Rehearing En Banc with the court of appeals. On January 10, 2003, the court of appeals denied Willis's petitions for rehearing and rehearing *en banc* in two *per curiam* orders. Willis's Petition for Certiorari followed.

REASONS FOR DENYING THE WRIT

Willis's Petition for Certiorari should be denied because the decision below was based upon a proper interpretation of the statute consistent with applicable precedent. Willis ignores governing precedent and relies upon inapposite authorities to support his position. The issue at hand is whether the track that PSO built for itself to handle only its own coal trains is subject to the Board's jurisdiction. The court of appeals made a proper decision based on sound and well-reasoned precedent and a fair reading of 49 U.S.C. § 10501 (2002), accepting the STB's determination that it does not have jurisdiction. Willis's Petition for Writ of Certiorari should be denied.

I. THE STB DOES NOT HAVE JURISDICTION OVER PRIVATE TRACK

The Board's general grant of jurisdiction is found at 49 U.S.C. § 10501(a)(1) (2002) which states that the STB has "jurisdiction over transportation by rail carrier...." Rail carrier is defined at 49 U.S.C. § 10102(5) (2002) as " a person providing common carrier railroad transportation for compensation". The phrase "common carrier" is not defined in the statute, but it has long been established that a critical determinant of whether an entity provides common carrier services is whether it holds itself out to provide service to the general public. *See, e.g., Status of Bush Universal, Inc.*, 342 I.C.C. 550, 564 (1973); *State of Vermont & Vt. Ry., Acquisition and Operation in Vt.*, 320 I.C.C. 609, 611-12 (1964); *Atchison, Topeka & Santa Fe Ry. v. Kansas City Stock Yards Co.*, 33 I.C.C. 92, 100 (1915); *Tap Line Case*, 23 I.C.C. 277, 292 (1912); and *Black's Law Dictionary* 205 (7th ed. 1999).

This holding out element is, therefore, a fundamental test for whether rail trackage constitutes a common carrier facility subject to the Board's jurisdiction. *See New York Cent. R.R. v. S. Ry.*, 226 F. Supp. 463 (N.D. Ill. 1964) *aff'd*, 338 F.2d 667 (7th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965) ("*New York Central*") and Finance Docket No. 32248, *Hanson Natural Resources Company – Non-Common Carrier Status – Petition for a Declaratory Order*, I.C.C. Served Dec. 5, 1994 ("*Hanson*").

In *New York Central*, the plaintiff sought to enjoin the defendant railroad from operating over private mine trackage, owned by Peabody Coal Company, which connected Peabody's mine to defendant's common carrier line, without first obtaining authorization from the ICC. Plaintiff relied on

Texas & Pac. Ry. v. Gulf, Colo. & Santa Fe Ry., 270 U.S. 266 (1926) to support its position that defendant's operation over the track to the mine was an extension of defendant's line that required Commission authorization. The defendant railroad argued that "it operates on the Peabody track to serve only the Peabody mine, that it has no right to serve anyone else, and that it does not hold itself out by tariff or otherwise to serve the general public over this track." *New York Central*, 266 F. Supp. at 466. The court concluded that authorization from the ICC was not needed to operate over the private track to serve the track owner.

> [A] carrier need not apply for Commission certification ... for operating over private track to serve the track owner, where the carrier does not engage in common carrier service over the track and where the carrier does not use it[s] funds to maintain the track....
>
> ....
>
> ...Unless the carrier operating over private track to serve the track owner serves the public over the track or makes some investment of its resources in the track, it is difficult to understand how the carrier could, thereby, 'undertake the extension of its line of railroad, or acquire or operate any line of railroad, or extension thereof, or engage in transportation under this chapter over or by means of such additional or extended line of railroad.'

New York Central, 226 F. Supp. at 473.

Almost twenty years later, the Board relied on *New York*

Central when it decided *Hanson*.[9] In *Hanson*, the ICC discussed in detail the subject of private rail track versus common carrier railroad lines, and found, in circumstances quite similar to those here (40 miles of private track over which the owner's coal was moved by a common carrier railroad from its mine to a point of connection with the common carrier railroad's lines), that the involved track was private track not subject to the agency's jurisdiction.[10] In so holding, the Board stated,

> A railroad is a common carrier if it purports to hold itself out as a common carrier for hire and if there is an ostensible and actual movement of traffic for the public for hire. The principal test is whether there is a bona fide holding out with the ability to carry for hire.

Hanson at 14. *See also* Finance Docket No. 32077, *Northern Plains Railroad Company – Construction and Operation Exemption – Musselshell and Yellowstone Counties, MT*, I.C.C. Served Dec. 28, 1992, (private railroad would not become a common carrier subject to the ICC's jurisdiction as long as it, or a third party under contract to it, carries only its corporate affiliate's property over its track between a coal mine and a connection with a common carrier); Finance

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[9] The Board noted that "[f]ew cases have involved a private line..." and that "[t]he best case that we have found that turns upon, and explains, operations by a common carrier railroad over a "private" line is [*New York Central*]." *Hanson*, at 23.

[10] The Board distinguished private lines which are not subject to section 10901(a) and section 10903(a) in the first instance, from an exempt spur under section 10907(b)(1) [now section 10906]. "[I]t should be noted ... that a private line, although it may be called a spur is not a section 10907(b)(1) [now section 10906] spur, because it is not, in the first place, a section 10901(a) railroad line." *Hanson*, at 21, n.12.

Docket No. 31916, *Boeing Company – Acquisition and Operation Exemption – Chehalis Western Railway Company*, I.C.C. Served Oct. 24, 1991, (shipper would not become a common carrier by railroad if it carried only its own property by rail between its plant and the point of connection with a common carrier's mainline.)

Thus, the first step in determining whether the STB has jurisdiction over a particular line of track is to determine whether the track is controlled by a common carrier. As discussed earlier, the Board has no jurisdiction over activities or operations by parties that do not hold themselves out to provide transportation service to the public. Neither the general licensing provision of 49 U.S.C. § 10901 (for the construction and operation of rail lines) nor the exception to that licensing requirement contained in 49 U.S.C. § 10906 (2002) (for auxiliary track) can have any application to tracks and operations that do not involve common carriage.

The facts in this case are clear and were recited by the STB in its October 1, 2001 decision in this matter:

> PSO submitted a verified statement stating that it had paid all of the construction cost of the track and owns it. It also asserts that it has not been, and has no intention of becoming, a common carrier, and it has not held out to, or granted BNSF rights to, provide service over the line to any other shipper. V.S. Cox at 4-5. Moreover, under the *New York Central* analysis, PSO states that BNSF does not own the line in fee or through an easement, does not spend its funds to maintain the line, and serves only PSO, which is the only shipper able to receive shipments on the line.

Finance Docket No. 34013, *B. Willis, C.P.A., Inc. – Petition*

for Declaratory Order, S.T.B. Served Oct. 3, 2001, at 3. Based on these facts, the Board's conclusion that neither the construction of this trackage, nor BNSF's operation over the trackage to serve the Northeast Station was subject to the Board's jurisdiction, was clearly correct.

Willis argues in its Petition that the issues at stake in this proceeding are important because many private tracks have been constructed in recent years. Although Willis exaggerates the number of private tracks constructed by electric utilities,[11] PSO strongly agrees that it is very important that the well-recognized legal status of private trackage as articulated in *New York Central*, *Hanson* and other precedents, not be disrupted. When an entity other than a common carrier railroad decides to build a line of rail, the status of that line, as private track or common carrier facility is a choice that is made based on circumstances unique to that situation.

While some companies choose to build private track, as PSO did here, others choose to offer service to other shippers who are either located on the line or might locate there in the future. Those that have chosen to assume this common carrier obligation have requested the necessary authorization. The actual number of potential shippers along the line is irrelevant to the status of the track and the jurisdiction of the STB.

There are various reasons why a shipper might choose to

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[11] Before the STB, PSO submitted evidence of four other private tracks that had been constructed by electric utilities to access rail competition, none of which had involved ICC or STB authorization for their construction or operation. (Verified Statement of Thomas D. Crowley at 2-3 (April 4, 2001).)

construct and operate track that is built to connect with the main line of the serving carrier as a common carrier facility rather than a private facility. For example, it might wish to take advantage of the revenue that might be generated from other shippers to reduce its own costs for use of the track. Another reason a shipper might choose to build a common carrier line is to obtain the benefit of § 10901(d)—available only to a common carrier that has been licensed by the Board to construct a rail line—to cross the line of an unwilling common carrier and to have the Board set the compensation if the parties cannot agree. In other circumstances, a shipper might choose to build a private track to avoid the expense and delay associated with the regulatory process.

Here, PSO chose to build and maintain a line of private track. The track was built and is maintained by PSO at its own expense to serve only its own traffic. PSO has never offered to make service available over the track to any other shipper. BNSF has no ownership interest in the line. It does not pay to operate over the line. It does not pay to maintain the line. The operations that BNSF conducts over the track are solely on PSO's behalf, and in fact, BNSF has no right to offer to provide service to any other shipper. (*See* PSO's Reply to Petition for Declaratory Order at 5.)

II. THE PREEMPTION PROVISION OF ICCTA DID NOT EXTEND THE STB'S JURISDICTION TO PRIVATE LINES

In his Petition for Certiorari ("Willis Pet."), Willis relies upon 49 U.S.C. § 10501(b), and cases interpreting and applying it, to argue that the STB has had exclusive jurisdiction over construction and operation of all rail trackage, including private track, since enactment of the ICC

Termination Act ("ICCTA")[12]. Willis Pet. at 8. He argues that *Hanson*, and implicitly *New York Central* and other prior law, was intentionally reversed by Congress in section 10501(b)(2) of the ICCTA. Willis Pet. at 13. This argument is not only erroneous, it runs directly counter to, yet, incredibly, fails even to mention the express legislative intent of the ICCTA.

Willis fails to distinguish the preemptive effect of 49 U.S.C. § 10501(b) from the general grant of jurisdiction contained in § 10501(a). Preemption only comes into play when some area of federal law expressly or implicitly regulates the field. Willis's reliance on preemption cases is thus misplaced. The question at hand is whether the STB has jurisdiction over private track, not whether federal law preempts state law. The STB's jurisdiction is set forth in 49 U.S.C. § 10501(a), not § 10501(b). In *CSX Transportation, Inc., v. Georgia Public Service Comm.*, 944 F. Supp. 1573 (N.D. Ga. 1996), a case prominently relied upon by Willis, plaintiff CSX Transportation was indisputably a common carrier and thus subject to the jurisdiction of the STB under 49 U.S.C. § 10501(a). The question for the court was whether state regulation of a particular area of CSX's activities, such as a customer service center, was allowed or whether § 10501(b) preempted state regulation.[13] The situation is very different here. PSO is not a rail carrier under

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[12] In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, Congress revised the Interstate Commerce Act, abolished the ICC (which had previously administered that Act), and transferred the remaining rail regulatory responsibilities to the Board, effective January 1, 1996.

[13] The same was true in *Burlington N. Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288 (D. Mont. 1997), another case relied upon by Willis in his Petition.

§ 10501(a), and the rail trackage at issue is not a common carrier facility, and thus the jurisdiction of the Board does not attach. Without jurisdiction in the first instance, the analysis should never reach subsection (b) pre-emption issues.

Willis completely ignores legislative history of which he is well aware when he relies upon the ICCTA in support of his claims that the Board has jurisdiction over the construction of rail trackage such as PSO's. While the ICCTA updated the language of § 10901(a) in several respects, it did not alter its pre-existing limitation to the construction, acquisition, or operation of a common carrier "railroad line." Moreover, the legislative history of the ICCTA explicitly confirms that Congress intended § 10901 to remain inapplicable to construction of tracks by non-railroads to serve their own facilities. *See* H.Rep. 104-422, *Conference Report on the ICC Termination Act of 1995* (Dec. 18, 1995), at 179:

> [T]he Conference intends no change in existing law with respect to the coverage of regulatory authority over construction of rail lines. Specifically, non-railroad companies who construct rail lines to serve their own facilities, whether or not such lines would be classified as a spur or other auxiliary track exempt from agency jurisdiction, are not required to obtain agency approval to engage in such construction.

The legislature has made clear that in relation to rail transportation, jurisdiction is vested in the STB only when a common carrier is involved (49 U.S.C. § 10501(a)). A common carrier must obtain a license to construct new track (49 U.S.C. § 10901) unless that track falls under an exception (49 U.S.C. § 10906) in which case the Board has jurisdiction, but no license is required. In these situations the Board's

jurisdiction is complete and preempts state regulation. When the owner of the track is not a common carrier but instead a non-railroad or private entity that does not hold out to provide common carrier service to the public, the Board does not have jurisdiction and therefore no license is required. PSO clearly falls into this latter category and therefore was not required to obtain a license from the Board.

As the foregoing discussion makes clear, the ICCTA clearly did not extend the Board's jurisdiction to private tracks. In fact, the legislative history specifically dismisses any such intent.

III. THE APPELLATE COURT'S DECISION DOES NOT SUFFER FROM ANY PROCEDURAL ERRORS

Willis argues that the Supreme Court should accept certiorari because the court of appeals based its decision on an argument that was only addressed during oral argument and that the court's decision made a significant departure from precedent. Willis is wrong on both counts.

The court of appeals remarked in its opinion that the Board's argument explaining 49 U.S.C. § 10501 was "made explicitly only at oral argument." Willis relies on this language in his Petition for Certiorari to warrant citing a string of authorities for the proposition that arguments presented to the court of appeals for the first time at oral argument are waived. *Comsat Corp. v. F.C.C.*, 250 F.3d 931, 936 n.5 (5th Cir. 2001). Willis's arguments are misplaced for a number of reasons.

The issue of jurisdiction was raised and discussed during briefing. The Government's brief made it clear that the Board's general jurisdiction over rail transportation is set

forth in 49 U.S.C. § 10501(a). *See* Joint Brief of Respondents at 4, 15. It is illogical to suggest that the Board was required to explain that 49 U.S.C. § 10501(b) does not grant the Board further jurisdiction, but rather renders the jurisdiction granted in 49 U.S.C. § 10501(a) exclusive. Nevertheless, the Board did specifically point out in its brief that Willis was focused on the wrong subsection of § 10501: "Willis in its brief quotes 49 U.S.C. 10501(b) and 10901(a) ... but fails to make any mention of section 10501(a), the Board's general grant of jurisdiction over transportation by rail carriers, and wholly ignores the limiting definition of 'rail carrier' in 49 U.S.C. 10102(5)," Joint Brief of Respondents at 16 n.15. It is evident that Willis was provided adequate notice of the distinction between 49 U.S.C. § 10501 subsection (a) and subsection (b).

One of the primary purposes of oral argument is to clarify for the court arguments made on brief. In fact, D.C. Circuit Rule 34(a) states that "Oral argument should undertake to emphasize and *clarify* the written argument appearing in the briefs...." (Emphasis added). While it may not be appropriate to raise for the first time during oral argument issues which should have been briefed, oral argument would serve little purpose if a party could not clarify a point for the court which was otherwise addressed. A court of appeals does "not normally pass upon claims that a party fails to articulate intelligibly," *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994), *reh'g and suggestion for reh'g denied, cert. denied*, 514 U.S. 1004 (1995). The Board's articulation of its interpretation of the statute as prompted by the court's questioning constituted a clarification of an existing issue, not, as Willis claims, a brand new issue.

Likewise, the court of appeals did not depart from precedent in deciding that the Board does not have

jurisdiction over private trackage. In its order, the court explicitly followed *Hanson* which held that private track is not subject to the Board's jurisdiction. The three cases cited by Willis in his Petition on page 24 in support of his theory that the appellate court departed from prior law are inapposite to the case at hand – all involved common carrier facilities clearly subject to the STB's jurisdiction under 49 U.S.C. § 10501(a).[14] In short, Willis's interpretation of 49 U.S.C. § 10501 is incorrect and the court of appeals properly affirmed the STB's conclusion that jurisdiction was lacking.

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[14] Finance Docket No. 33466, *Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corp.*, S.T.B. Served February 27, 2001 (involving common carrier railroad's construction and operation of facilities); Finance Docket No. 33971, *Joint Petition for Declaratory Order – Boston and Maine Corp. and Town of Ayer, Ma.*, S.T.B. Served May 1, 2001 (dealing with the broad scope of federal preemption); and Finance Docket No. 34020, *Fletcher Granite Company, LLC – Petition for Declaratory Order*, S.T.B. Served June 29, 2001 (addressing 49 U.S.C. §§ 10901(a) and 10906 and the scope of federal preemption).

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

Kenneth E. McDonough
Assistant General Counsel
American Electric Power
Service Corporation
One Riverside Plaza
Columbus, OH 43215

C. Michael Loftus*
Karen Hassell Herren
Slover & Loftus
1224 17th Street, N.W.
Washington, DC 20036
Tel: (202) 347-7170

Counsel for Respondent
Public Service Company of Oklahoma

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*Counsel of Record